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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 305

THE DENVER AND RIO GRANDE WESTERN R.R. CO., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

WILLIAM H. DEMPSEY, JR.
MARTIN J. FLYNN
734 Fifteenth Street, N.W.
Washington, D.C. 20005
GILES MORROW
1012—14th Street, N.W.
Washington, D.C. 20005
HARRY C. AMES
529 Transportation Bldg.
Washington, D.C. 20006
Counsel for appellant Freight Forwarders Institute

PETER T. BEARDSLEY
HARRY JORDAN
R. EDWIN BRADY
1616 P Street, N.W.
Washington, D.C. 20056
Counsel for appellant American Trucking Associations, Inc., and Regular Common Carrier Conference

JEREMIAH C. WATERMAN
205 Transportation Bldg.
Washington, D.C. 20006
ROYCE D. SICKLER
T. A. WHITE
1531 Stout Street
Denver, Colorado 80217
R. K. KNOWLTON
80 East Jackson Boulevard
Chicago, Illinois 60604
HARRY B. LATOURETTE
C. W. FIDDES
1517 West Front Street
Tyler, Texas 75702
Counsel for appellant Railroads

DAVID AXELROD
39 South La Salle Street
Chicago, Illinois 60603
EUGENE T. LIIPFERT
RONALD B. NATALIE
1035 Universal Bldg., North
Washington, D.C. 20009
Counsel for appellant Motor Carriers

WARREN A. GOFF
315 Continental Avenue
Dallas, Texas 75207
Counsel for appellant Motorbus Carriers

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v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the United States District Court for the District of Colorado dismissing complaints by which appellants challenged an order of the Interstate Commerce Commission.[1] Appellants submit

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[1] The appellants consist of railroads, freight forwarders, motor carriers, and motor bus companies. They are: The Denver and Rio Grande Western Railroad Company; The Atchison, Topeka and Santa Fe Railway Company; St. Louis Southwestern Railway Company; St. Louis Southwestern Railway Company of Texas; Southern Pacific Company; Ringsby Truck Lines, Inc.; Navajo Freight Lines, Inc.; Denver-Chicago Trucking Company, Inc.; Illinois-California Express, Inc.; Pacific Intermountain Express Co.; Transcon Lines; Watson-Wilson Transportation System, Inc.; Western Gillette, Inc.; Consolidated Copperstate Lines; American Trucking Associations, Inc.; Regular Common Carrier Conference; Freight For-

this Statement to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

Opinion Below

The opinion of the District Court, which is reported unofficially at 14 Fed. Car. Cases ¶ 81, 814, is reproduced as Appendix A hereto. The order of the Interstate Commerce Commission, which is unreported, is reproduced as Appendix B.

Jurisdiction

This suit was brought under 28 U.S.C. 1336, 1398, 2321-2325, to set aside an order of the Interstate Commerce Commission. The final judgment of the three-judge District Court was entered on April 11, 1966, and the notice of appeal was filed on May 3, 1966. This Court has jurisdiction under 28 U.S.C. 1253 and 2101(b) to review the judgment of the District Court on direct appeal. *United States* v. *Drum*, 368 U.S. 370; *Dixie Carriers* v. *United States*, 351 U.S. 56.

Questions Presented

The order of the Interstate Commerce Commission here in issue approved a proposed stock transaction between Railway Express Agency, Inc. (hereinafter "REA") and the Greyhound Corporation (hereinafter "Greyhound")

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warders Institute; Transcontinental Bus System, Inc.; American Buslines, Inc.; Arkansas Motor Coaches Ltd., Inc.; Bayshore Bus Lines, Inc.; Continental Bus System, Inc.; Continental Crescent Lines, Inc.; Continental Panhandle Lines, Inc.; Continental Southern Lines, Inc.; Continental Tennessee Lines, Inc.; Denver-Colorado Springs-Pueblo Motorway; Denver-Salt Lake-Pacific Stages, Inc.; Continental Pacific Lines, Inc.; Midwest Buslines, Inc.; Smoky Mountain Stages, Inc.; Tennessee Trailways, Inc.; Union Bus Lines, Inc.; and Muscatine, Davenport and Clinton Bus Company.

The appellees, in addition to the United States, are the Interstate Commerce Commission, Railway Express Agency, Inc., and The Greyhound Corporation.

as in the "public interest" and for a "lawful object" under sections 20a(2) and 214 of the Interstate Commerce Act, 49 U.S.C. 20a(2), 314. The questions presented are:

1. Whether, in view of the Commission's statutory obligation under section 11 of the Clayton Act, 15 U.S.C. 21, to enforce section 7 of that Act, 15 U.S.C. 18, and in view of the bar to private relief of section 16 of that Act, 15 U.S.C. 26, the Commission was obliged to determine whether the transaction would violate section 7 and to refuse approval if it would violate that section.

2. Whether the Commission was obliged in any event to evaluate the probable impact of the proposed transaction upon competition and to weigh that impact together with other factors relevant to the "public interest."

3. Whether the Commission was obliged to determine whether the proposed transaction would violate section 5(4) of the Interstate Commerce Act, 49 U.S.C. 5(4), because it would result in the acquisition of "control" by Greyhound of REA, and to refuse approval if there would be such a violation.

4. Whether the Commission's order sets forth with sufficient clarity the findings and rationale supporting its decision.

5. Whether the Commission had discretion to approve the proposed transaction without conducting a hearing.

Statutes Involved

The statutes involved are portions of sections 7, 11, and 16 of the Clayton Act, 15 U.S.C. 18, 21, 26; portions of sections 5, 20a, and 214 of the Interstate Commerce Act, 49 U.S.C. 5, 20a, 314; and section 8(b) of the Administrative

Procedure Act, 5 U.S.C. 1007(b), all of which are set forth in Appendix C hereto.

Statement

Basically, the question in this case is whether the Interstate Commerce Commission discharged its statutory responsibilities in approving an acquisition by appellee Greyhound—the second ranking carrier of express freight—of a substantial stock and management interest in appellee REA —the first ranking carrier of express freight.

This controversy began with an application by REA under sections 20a(2) and 214 of the Interstate Commerce Act, 49 U.S.C. 20a(2), 314, for approval by appellee the Interstate Commerce Commission of the issuance by REA of 20% of its stock to Greyhound. Section 20a(2) requires carriers subject to Part I of the Act to secure Commission approval for the issuance of securities, and empowers the Commission to approve only if the transaction is "compatible with the public interest" and "for some lawful object within [the applicant's] corporate purposes." Section 214 applies section 20a to carriers subject to Part II, such as REA. (For the sake of brevity, we hereafter refer only to section 20a.)

In a related Commission proceeding, appellant Southern Pacific Company, an REA stockholder, filed a complaint under section 5(7) of the Act, 49 U.S.C. 5(7), seeking an investigation to determine whether the proposed stock sale would violate section 5 because it would result in the acquisition by Greyhound of "control" of REA without the approval of the Commission.

Appellee the United States and appellants intervened in opposition to REA's application, while Greyhound intervened in its support. The United States maintained that the Commission, in view of its obligation under section 11

of the Clayton Act, 15 U.S.C. 21, to enforce that Act, should not approve the stock sale without determining whether it would violate section 7 of the Act, 15 U.S.C. 18.[2] Other interveners raised both the impact on competition question and the section 5 "control" question.[3]

In accord with REA's request, the Commission denied the application of interveners for an evidentiary hearing. Instead, the Commission based its decision solely upon the written materials submitted by REA. The materials disclosed the following:

The negotiations between Greyhound and REA began as an attempt by Greyhound to secure a majority of REA stock.[4] At the request of the REA Board of Directors, Greyhound offered to purchase 67% of REA's stock.[5] While the details of what happened respecting that offer do not appear in the record, REA stated generally to the Commission that the offer was unsuccessful because some REA stockholders, who held a right of first refusal on offers to sell by other stockholders, indicated they would exercise that right if the stock were offered to Greyhound.[6]

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[2] Petition Of The United States Department Of Justice For Leave To Intervene, For Consolidation Of This Proceeding With A Proceeding To Determine The Lawfulness Of The Proposed Transaction Under Section 7 Of The Clayton Act, For A Full Evidentiary Hearing, And A Pre-Hearing Conference.

[3] See, *e.g.* the Petition of Transcontinental Bus System, Inc., and the Petition For Reconsideration of the American Trucking Associations, Inc.

[4] Return [by REA] to Information Request to REA (hereinafter "REA Return"), p. 1. ("In January 1964, representatives of Greyhound approached REA with a proposal . . . to acquire a controlling interest in REA.")

[5] REA Return, p. 1; *id.*, Annex A(1).

[6] REA Return, pp. 1-2.

In order to circumvent this obstacle, "consideration was given to the possibility of Greyhound's acquisition of 500,000 shares of authorized but unissued REA stock, these shares not being subject to the right of first refusal."[7]

The ensuing negotiations, which led to the final contract, are of primary importance. The most significant features of the negotiations, which we describe fully below, were that Greyhound's acknowledged purpose was to achieve a "coordination" of REA and Greyhound express service; that the Board and management of REA shared that goal; that Greyhound and REA reached tentative agreements upon the particular types of "coordination" that would be beneficial; that those agreements reflected a desire virtually to eliminate competition between the two companies; that Greyhound's desire to acquire a majority stock interest persisted, but that Greyhound was willing to wait for the acquiescence of the REA minority stockholders; that Greyhound believed that a 20% interest would be a sufficient basis for effecting coordination, provided the 20% offer was approved by a large enough majority of REA stockholders so that the cooperation of REA management would be assured; and that over 80% of REA stockholders did accept. In more detail, the record discloses the following:

About five months after Greyhound's offer to acquire a majority interest, officers of the two companies concluded a 2½ day conference with a "Memorandum of Understanding" respecting "Potential Benefits By Consolidation or Merger of Certain Activities of the Two Companies." The provisions of this document—a blueprint for the elimination of competition—are described in detail in

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[7] REA Return, p. 2.

the margin.[8] What was contemplated was a fusion of REA and Greyhound express activities. Thus, from the physical standpoint, they would combine their terminals, their depot

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[8] The memorandum may be summarized as follows:

1. Because Greyhound's terminal facilities are strained and becoming more and more inadequate, it would use REA's and "REA would perform the terminal services, other than loading and unloading of buses. . . ."

2. Greyhound would take over the service and maintenance work on all REA automotive equipment in 37 cities where now each has garage operations, and perhaps in 11 more cities. Moreover, Greyhound has "headquarters staff and field supervision sufficient with the addition of a few people to take care of the staff work and field supervision on all REA automotive equipment."

3. REA and Greyhound would utilize "joint communication facilities and the present and proposed data processing system and machine accounting of REA," and they would use to the extent possible joint billing and accounting procedures.

4. The two companies would use the same salesmen and the same advertising program and agency.

5. Wherever REA express depot and express office facilities were satisfactory among the 683 points where both companies have such facilities, Greyhound could use the REA facilities.

6. There is a "very strong possibility . . . for what could be termed a package bus distribution service tied in with REA's Air Express, highway or rail operations." Thus, as to Air Express, off-airline points could be reached by tacking on Greyhound bus express. And "[r]ail-bus express service would create a new capability for the two carriers to compete in the ltl market."

7. Because Greyhound has about 50% excess capacity at the present between other than principal cities, it "could and would offer to REA an attractive linehaul cost" so that REA could utilize Greyhound's capacity instead of using its own trucks or third party trucks. "This will eliminate the expense of REA's over-the-road operations in this category or the third party truck routes. . . ."

8. "Other possibilities" include:

   a. Joint purchasing.
   b. REA's utilizing Greyhound's highway safety supervisors and line representatives.
   c. Greyhound's using REA's research group.
   d. "[A] possibility of some consolidated effort or assistance between the Boothe Leasing Corporation of Greyhound and REA Leasing Corporation."
   e. Greyhound's using REA to perform pick-up and delivery for its express movements.
   f. Greyhound's subsidiary, Greyhound Van Lines, could, as to less than van load volume, have REA provide a rail container service.
   g. Again as to Greyhound Van Lines, REA could act as sales agent.

and express office facilities, their service and maintenance work, their communication, data processing, and accounting facilities and procedures, their safety supervisors and line representatives, and their research activities. From a sales standpoint, they would use the same salesmen, the same agency, and the same advertising program. And, from an operational standpoint, Greyhound would use REA to perform terminal and pick-up and delivery services on Greyhound express movements; REA would use Greyhound's express service to tack on to REA's air and railway express service to reach off-airline and off-rail points; and Greyhound would offer REA an especially attractive arrangement for employing Greyhound instead of REA or third-party trucks to perform the underlying transportation for REA express service between other than principal cities, where Greyhound has about 50% excess capacity.

Only about three weeks later, the REA Board approved "in principle" the suggestion of Greyhound that it acquire a 20% REA stock interest.[9] Thereupon Greyhound submitted a formal offer in which it stated that its "interest in REA . . . stems primarily from our views as to the improvements which could be realized through combination and correlation of certain of our facilities and services"; that the "studies which we have made separately and jointly with your representatives confirm that there are tremendous possibilities in these respects"; but that "in order to give Greyhound an incentive to pursue these possibilities it should have at least a 20% equity interest in REA." Accordingly, Greyhound incorporated in its offer the requirement that REA commit itself to "consider seriously and work toward a long-term agreement between REA and Greyhound to consolidate operating functions

[9] REA Return, Annex A(3).

and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies to be shared by REA and Greyhound." Greyhound also stated that it would accept additional REA shares, but that it did not insist upon more than a 20% interest because it did not want controversy with REA minority stockholders to "delay" or "frustrate completely" the contemplated "improvements in service." Thus, Greyhound was willing to "leave to the future" the question of further stock acquisitions.[10]

A committee of the REA Board negotiated with Greyhound representatives respecting certain modifications—not here material—in the proposal, and that committee reported that Greyhound "was reluctant to make another formal offer to REA because it was not clear to them . . . that such a proposal would receive sufficient support from this Board and the REA stockholders *to insure that a satisfactory working agreement between REA and Greyhound would be possible.*" (Emphasis supplied.) However, according to the REA committee, Greyhound would "look favorably upon a firm offer from REA . . . if it were adopted by such a substantial vote of the REA Board and stockholders *as to carry some measure of assurance that a constructive working relationship could be developed.*" (Emphasis supplied.) [11]

REA's President stated to the Board that "in the opinion of the management of REA it would be greatly in the interest of REA" to sell the stock to Greyhound "*and to enter into working arrangements with Greyhound* which would result in substantial savings for REA and improved service to the public." (Emphasis supplied.)[12]

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[10] REA Return, Annex A(4).

[11] REA Return, Annex A(6).

[12] REA Return, Annex A(6).

The REA Board thereupon called a stockholders meeting to approve the sale, and in the Board's proxy statement the negotiations were described in terms of Greyhound's "obtaining an equity interest in the Corporation with the ultimate purpose of achieving certain economies which could be realized through combination and correlation of certain of the facilities and services of Greyhound and the Corporation."[13] The Board had approved 14 to 3,[14] and the stockholders approved by over an 80% majority.[15]

The final offer, which was accepted by Greyhound, had the following relevant terms:

a. Greyhound would purchase 500,000 shares of REA's authorized but unissued stock.

b. Greyhound would name 20% of the REA Board.

c. The REA Board was to adopt—as it did—a resolution "declaring the intention to consider seriously and work toward a long-term agreement between REA and The Greyhound Corporation to consolidate operating functions and facilities, and to cooperate in all lawful, feasible and jointly advantageous ways to effect economies, improve service and increase public receptivity and patronage."

d. For a period of 60 days after the closing of the 20% transaction, Greyhound would offer to purchase up to 1,000,000 additional shares of REA stock from present stockholders.[16]

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[13] REA Return, Annex B, p. 2.

[14] REA Return, Annex B, p. 5.

[15] REA Return, p. 5.

[16] Application of Railway Express Agency, Incorporated, Exhibit 4; REA Return, Annex A(6).

These, then, were the facts upon which the Commission was asked to decide whether the transaction would have an anticompetitive impact that was relevant to the question whether it was "compatible with the public interest" and for a "lawful object" under section 20a(2); whether, in view of the Commission's responsibilities under section 11 of the Clayton Act, the Commission would have to determine that the acquisition would not violate section 7 of the Clayton Act before giving its approval; and whether the transaction would involve the acquisition by Greyhound of "control" of REA within the meaning of section 5 of the Interstate Commerce Act, so that approval could be given only in a section 5(2) proceeding.

The Commission granted REA's application and denied both the request for a section 5(7) investigation and the request for a Clayton Act section 11 hearing. As we read the order, the Commission disposed of the section 7 issue simply by saying that a determination of that issue "would not be appropriate at this time," without stating why, and held that the transaction would not result in an illegal acquisition of control because Greyhound's position in REA would not be dominant. However, except in our discussion of the fatally ambiguous character of the order (*infra* pp. 24-27), we accept *arguendo* the lower court's reading of the order, which we describe below.

Appellants' suit to set aside the order was dismissed by a three-judge federal court in the District of Colorado. As the court construed the order, the Commission declined to pass upon questions relating to anti-competitive impact and acquisition of control because "determination of [those] questions must await developments subsequent to the issuance of the 500,000 shares of REA stock to Greyhound" (App. A, *infra* p. 39). More particularly, the court thought the Commission put those questions aside

because Greyhound's 60-day offer to purchase an additional 1,000,000 shares might result in relevant changes in the situation. Thus, 60 days after Commission approval of the 20% transaction, while if no REA stockholders offered shares to Greyhound there would be no change, if such offers were made Greyhound might own more than 20% —up to slightly over 50%—or the minority stockholders might exercise their right of first refusal and purchase these shares.

The court held that in these circumstances the Commission "took the proper course" in approving the 20% transaction without considering its anticompetitive impact, or whether it would violate section 7, or whether it would violate section 5. While rejecting REA's contention that a section 20a(2) proceeding should never embrace such considerations, the court concluded that, in view of future uncertainties, the Commission was not required to pay heed to such factors in this case. In so ruling, the court relied upon this Court's decision in *Seaboard Air Line R.R.* v. *United States,* 382 U.S. 154, stating: "We see no reason why the principles announced in *Seaboard* as applicable to a § 5 merger proceeding do not apply to a § 20a stock issuance proceeding" (App. A, *infra* p. 39).

Upon institution of the litigation, the Commission stayed its decision pending further order. That stay is still in effect.

The Questions Are Substantial

This case, from a factual standpoint, involves the establishment of a close relationship between the nation's two largest carriers of express that is likely to produce a serious impact on competition. Consequently, the case is of large economic significance. From a legal standpoint, the issues presented are of considerable importance in the administration of the Interstate Commerce and Clayton Acts. By section 11 of the Clayton Act, 15 U.S.C. 21, the Congress

imposed upon the Commission the obligation to enforce section 7 with respect to carriers under its jurisdiction—the Commission "shall issue" a complaint whenever it "shall have reason to believe" that there is a violation of section 7. That obligation is particularly heavy because the Congress also, by section 16 of the Clayton Act, 15 U.S.C. 26, disabled private parties from seeking judicial injunctive relief respecting transactions falling within the Commission's section 7 jurisdiction. Nonetheless, in this case the Commission, in a proceeding under section 20a of the Interstate Commerce Act, 15 U.S.C. 20a, ruled that it was not obliged to consider the probable anticompetitive impact of the REA-Greyhound transaction in determining whether the transaction was in the "public interest" and for a "lawful object"—the relevant section 20a standards. The lower court agreed. We believe that decision was incorrect. At the least, the decision raises questions that are substantial.

1. *The probable anti-competitive impact of the REA-Greyhound transaction.* Neither the Commission nor the lower court has denied that, putting aside possible future developments, the REA-Greyhound transaction would have a serious anticompetitive impact, nor that the transaction would violate section 7 of the Clayton Act. Both Commission and court simply refused to deal with those issues. The fact is that the record establishes the probability of a serious anti-competitive effect and a section 7 violation, and this is so whatever the outcome of the 60-day offer.

It is settled that the term "the whole or any part of the stock" in section 7 is to be read literally, so that the acquisition of a minority stock interest violates the statute if the result "may be substantially to lessen competition or to tend to create a monopoly" "in any line of commerce in any section of the country." *United states* v. *Du Pont & Co.*, 353 U.S. 586 (1957) (23% stock interest); *Briggs*

Manufacturing Co. v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F.2d 747 (6th Cir. 1960) (22% interest); *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 152 F. Supp. 387 (S.D. N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958) (23% interest); *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F.Supp. 307 (D. Conn. 1953), *aff'd*, 206 F.2d 738 (2d Cir. 1953) (24% interest).

Since the Commission refused to explore the matter, there is no detail in the record as to the next question—the relevant market. However, it was asserted before the Commission,[17] and not disputed by anyone, that the relevant market is the transportation of express freight. This type of transportation is differentiated from other types primarily in terms of expedition. Traditionally the service has commanded a premium price, and in consequence its use generally has been confined to items requiring speedy delivery and of more than ordinary value. See, *e.g.*, *Coordination of Motor Transportation*, 182 I.C.C. 263, 348 (1932); *San Francisco Wholesale Dairy Produce Exc.* v. *American Ry. Exp. Co.*, 78 I.C.C. 737, 740 (1923); *R.R. Commissioners of Florida* v. *Southern Express Co.*, 44 I.C.C. 645, 647 (1917); *Davies Spur, Wash., Express Rates*, 43 I.C.C. 143, 146 (1917); *Kindel* v. *Adams Express Co.*, 13 I.C.C. 475 (1908).

The final question is whether, in this market, the acquisition "may" either "substantially lessen competition" or "tend to create a monopoly." As to one critical consideration—share of the market—the record is silent because the Commission refused to seek the relevant information. However, it was asserted in the Commission proceedings, and not denied, that REA and Greyhound are respectively the first and second ranking carriers of express.[18] And, of course, the Commission knew this to be true, as does anyone

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[17] See Petition of American Trucking Associations, Inc., et al., for Reconsideration, p. 6.

[18] Petition of American Trucking Associations, Inc., et al., for Reconsideration, p. 6.

with any familiarity with the transportation industry. Moreover, data subject to judicial notice, and brought to the attention of the lower court, indicates that REA has a virtual monopoly of express traffic, with Greyhound its only substantial competitor. Thus, the annual reports filed by carriers with the Commission indicate that in 1964 REA, with revenue of approximately $412,000,000, controlled about 88% of the market; Greyhound, with express revenue of about $33,000,000, had about 7%; and all other motor carriers of passengers combined, with express revenues of approximately $21,000,000, had most of the balance.[19]

Given this market dominance, it is evident that the proposed acquisition would probably violate section 7. Under *United States* v. *Philadelphia National Bank*, 374 U.S. 321, the market positions of REA and Greyhound would place a heavy burden on them to prove that there would not be a lessening of competition. In that case, the Court held that a 30% market share was "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. . . ." *Id*, at 363, 364. See also, *e.g.*, *United States* v. *Pabst Brewing Co.* — U.S. — (June 13, 1966); *United States* v. *Von's Grocery Co.*, — U.S. — (May 31, 1966)

The facts of record in this case strongly reinforce the inference that competition would be lessened. To recapitulate briefly, Greyhound began with an intention of securing a majority stock interest in REA and still harbors that purpose, but is willing to wait until the opposition of a few REA stockholders dissolves; in the meantime, Grey-

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[19] Some motor carriers of freight hold express certificates, and we were not able to locate express revenue data as to them. However, we are confident that the data respecting these other carriers would not affect the Clayton Act question at all; and the Commission did not respond to our invitation in the lower court to adduce any additional figures from its files if it thought they might make a difference.

hound is satisfied that a 20% stock interest and a 20% representation on the REA Board—which cannot be modified without Greyhound's consent—will serve its purposes, since those purposes are shared by REA management, directors, and holders of over 80% of REA's stock; and those purposes are to effect a consolidation of REA and Greyhound express activities.

Even without specification as to the type of "consolidation" envisioned, this intercorporate arrangement predictably would mute competition between REA and Greyhound, and, in view of their market strength, would impair the competitive position of others and tend toward monopoly. Moreover, the "Memorandum of Understanding" between the two companies indicates, in brief, that REA is to use Greyhound transportation, supporting services, and facilities instead of its own or that of third parties where that appears most beneficial, and that Greyhound is to do the same. That there will no longer be active competition is strikingly evidenced by the fact that the two companies contemplate using the same salesmen and sales agency. Such an elimination of competition will drastically curtail the opportunity of third party express carriers to compete with Greyhound for REA business, with REA for Greyhound business, and with both of them for the patronage of the public.

While, if REA's minority stockholders were to acquire an additional 1,000,000 shares of stock, the precise degree of impact of the REA-Greyhound transaction might be affected, the conclusion that there would in any event be a section 7 violation would not be changed. Three leading lower court decisions so establish. In *Briggs Manufacturing Company* v. *Crane Co.*, 185 F. Supp. 177 (E.D. Mich. 1960), *aff'd*, 280 F.2d 747 (6th Cir. 1960), in *American Crystal Sugar Co.* v. *Cuban-American S. Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958), and

in *Hamilton Watch Co.* v. *Benrus Watch Co.*, 114 F. Supp. 307 (D. Conn. 1953), *aff'd*, 206 F.2d 738 (2d Cir. 1953), acquisitions of a 22% interest, a 23% interest, and a 24% interest, respectively, were held violative of section 7 despite the fact that the company whose stock was being acquired was vigorously opposed to the acquisition. In each of these cases, the court placed particular stress upon the desire of the acquiring company ultimately to gain a majority interest, and upon the fact that even their minority interest would enable them to place a representative upon the board of directors. "[W]ith two sympathetic representatives on the Board, Crane will have driven the wedge in its attempts to gain control of Briggs' assets." 280 F.2d, at 750.[20] See also *Chesapeake & Ohio Railway Company Purchase*, 271 I.C.C. 5 (1948) (6.2% stock interest coupled with board representation.)

In sum, the circumstances disclosed by the record in this case, regardless of the result of Greyhound's 60-day offer, establish a probable violation of section 7. That section, as this Court has recently observed once again, *United States* v. *Pabst Brewing Co.* — U.S. — (June 13, 1966), was designed to arrest restraints on trade and monopolies "in their incipiency and before consummation. . . ." S. Rep. No. 698, 63d Cong., 2d Sess. 1. See also, *e.g.*, *United States* v. *DuPont & Co.*, *supra*, at 597; *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 317-318. And with respect to the monopoly standard, "[U]nder section 7 it is not necessary

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[20] To the same effect: "Section 7 includes within its scope a percentage interest sufficient to elect nominees to the Board of Directors." 185 F. Supp., at 184. Placing a nominee upon the board would "limit the effectiveness of the competition." 152 F. Supp., at 394. The presence of a representative on the board "would create a situation in which Benrus would have power to discourage the vigor of competition by Hamilton and so to embarrass and impede Hamilton's management that it might well be driven to unwanted collaboration or to a merger as the least of two evils." 114 F. Supp., at 314.

. . . to find that [the defendant] has actually achieved monopoly power but merely that the stock acquisitions under attack have brought it measurably closer to that end. For it is the purpose of the Clayton Act to nip monopoly in the bud." *Transamerica Corp.* v. *Board of Governors*, 206 F.2d 163, 169 (3d Cir. 1953), quoted with approval in *United States* v. *DuPont & Co., supra*, at 592-593. Surely those purposes would be frustrated by the proposed REA-Greyhound transaction.

2. *The alternatives open to the Commission.* The significance of the legal issues raised upon the basis of this record may be most clearly perceived in the context of the different courses of action the Commission might have taken. Basically, the options were four:

First, the Commission could have denied REA's application on the ground that, whatever the outcome of the 60-day offer, the probable anticompetitive impact of the acquisition was such that REA had not met its burden of establishing that the transaction would comport with the "public interest" and would be for a "lawful object."[21]

Second, if the Commission thought that the result of the 60-day offer might affect its judgment, it could have denied the application because the record did not establish "public interest" or "lawful object," noting, however, that REA could renew the application if the terms of the transaction were modified so that Greyhound's offer to purchase additional shares would expire *before* application to the Commission so that the stock interests of the various parties would be fixed.

Third, the Commission could have held an evidentiary

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[21] The applicant, of course, has the burden of proof. See *Shein* v. *United States*, 102 F. Supp. 320, 324 (D.N.J. 1951); *Houf Transfer* v. *United States*, 105 F. Supp. 851, 855 (W.D. Va. 1952).

hearing to determine if either of the above actions should be taken.

If the Commission had adopted any of these courses, REA's only "complaint" as to the procedure could have been that the Commission had insisted upon scrutinizing the probable anticompetitive impact of the proposed transaction before approving it.

The Commission, however, chose a fourth alternative: It approved the transaction without evaluating at all its probable anticompetitive effect on the ground that the 60-day offer might work changes in relevant facts. The impact of this action upon appellants is severe. First, they are deprived of any *right* to have any tribunal consider the anticompetitive effect of the transaction. They may only in the future ask the Commission in its discretion to investigate the "control" question under section 5(7) of the Interstate Commerce Act and the section 7 question under section 11 of the Clayton Act. Given the history of Clayton Act proceedings in the Commission,[22] appellants cannot be sanguine about the fate of such applications, particularly if the 60-day offer does not result in an increase in Greyhound's stock ownership. Nor can the appellants turn to the courts to restrain the acquisition or to compel divestiture, for section 16 of the Clayton Act, 15 U.S.C. 26, bars injunctive relief against companies subject to Commission jurisdiction.

Moreover, even were appellants ultimately to persuade the Commission to inaugurate an investigation, the 20% stock transaction approved by the Commission, as well

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[22] We have discovered only three cases—and they are decades old—in which the Commission has acted under Section 11 of the Clayton Act. See *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 160 I.C.C. 785 (1930); *Interstate Commerce Commission* v. *Pennsylvania R. Co.*, 169 I.C.C. 618 (1930); and *Interstate Commerce Commission* v. *Baltimore & O. R. Co.*, 152 I.C.C. 721 (1929).

as any other transactions occurring pursuant to the 60-day offer, would already have occurred. Thus appellants would be deprived of the most effective remedy—a restraining order blocking the acquisition until final adjudication. See, *e.g.*, *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, —— n. 5 (June 14, 1966), citing with approval *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 186. Thus, given the normal duration of this type of litigation—in oral argument REA counsel gave a "conservative estimate" of "two or three years" (Tr. p. 47)—much of the damage feared by appellant might already have been done. In this connection, the vulnerability of appellant motorbus carriers is particularly instructive. As their 1965 reports filed with the Commission reveal, in that year 14.33% of their gross revenue was derived from package express service, and that amounted to over twice their net profit after taxes and was substantially equivalent to their net profit before taxes.[23] In short, express service revenue is substantially the measure of profitability of these companies, who constitute the only significant competitors of Greyhound in the motorbus field.

The question, then, is whether the lower court correctly construed the relevant statutory provisions to permit the Commission to approve the transaction as consonant with

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[23] In the Commission proceedings, this data was not pleaded in detail because appellants anticipated an evidentiary hearing. Thus appellant motor bus carriers simply alleged in conclusory terms that "[n]o motorbus company could hope to meet the competition offered by a consolidation of the R.E.A. and Greyhound terminal facilities and operations." Petition of Transcontinental Bus System, Inc., et al. Seeking Leave to Intervene p. 7. However, the data, as we have indicated, is contained in the annual reports appellants are required to file with the Commission, and hence is subject to judicial notice. Moreover, the Commission, because of its general knowledge of motorbus business, doubtless was aware of the importance to appellants of express traffic.

the "public interest" and for a "lawful object" without evaluating competitive factors.

3. *Misapplication of the* Seaboard *decision.* In upholding the Commission's action, the lower court, as we have indicated (*supra*, p. 12), relied upon *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154. The court's error was twofold.

First, assuming for the moment that the *Seaboard* principle is applicable in a section 20a(2) proceeding as well as in a section 5 merger or acquisition of control proceeding, that principle does not support the lower court's decision. To be sure, under *Seaboard* the Commission is not obliged to apply strictly the standards of section 7 in evaluating the competitive impact of a transaction. But *Seaboard* does *not* hold—and this Court has *never* held—that the Commission may altogether decline to weigh the probable anticompetitive effect of a proposed transaction on the ground that some of the relevant facts are uncertain. To the contrary, in *Seaboard* this Court reaffirmed its prior decisions in *McLean Trucking Co.* v. *United States*, 321 U.S. 67, and *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173, that " '[t]he Commission remains obligated to "estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed [acquisition] and consider them along with the advantages of improved service [and other matters in the public interest] to determine whether the [acquisition] will assist in effectuating the overall transportation policy." 321 U.S., at 87.' " (Brackets in original.) 382 U.S., at 156.[24] If there

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[24] For similar rulings respecting other regulatory statutes where the standard for agency decision is the "public interest" or the "public convenience and necessity," see *California* v. *Federal Power Comm'n*, 369 U.S. 482, 484-485; *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 224; *Federal Communications Commission* v. *RCA Communications*,

is to be a departure from this rule, as there has been in this case, surely it would have to be based upon the most compelling circumstances. There are none here, for it was within the control of REA and Greyhound to resolve any uncertainty raised by the 60-day offer simply by modifying the terms of their contract so that the offer would expire prior to Commission action.

The lower court's second mistake was in concluding that this Court's section 5 decisions govern in a section 20a(2) proceeding. The principle established first in *McLean Trucking Co.*, and thereafter applied in *Minneapolis & St. Louis R. Co.* and *Seaboard*—that in a section 5 case the Commission is not bound by, though it must consider, the policies of the antitrust laws—is grounded fundamentally upon the fact that the Congress, in section 5(11), has empowered the Commission to immunize mergers from the antitrust laws. See *McLean Trucking, supra, passim.* The Commission, however, cannot confer such immunity in a section 20a(2) proceeding. Section 20a(2), in contrast to section 5, contains no immunizing authority; and this Court has held that the general immunity language of section 7 confers no independent authority upon agencies, so that only the sort of explicit language incorporated in section 5 can empower an agency to insulate a company from the antitrust laws. *California* v. *Federal Power Comm'n*, 369 U.S. 482. See also *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 350-351; *Maryland & Virginia Milk Producers Ass'n* v. *United States*, 362 U.S. 458, 470; *United States* v. *Borden Co.*, 308 U.S. 188, 198; *United States* v. *RCA*, 358 U.S. 334.

The lower court's holding that the Commission's discretion in a section 20a(2) proceeding is the same as in a sec-

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Inc., 346 U.S. 86, 94; *City of Pittsburgh* v. *Federal Power Comm'n*, 237 F. 2d 741, 754 (D.C. Cir. 1956); *Greater Baton Rouge Port Comm'n* v. *United States*, 287 F. 2d 86, 95 (5th Cir. 1961).

tion 5 proceeding means that, despite the fact that the Commission may not immunize the transaction from the antitrust laws, and in the face of its obligation under section 11 of the Clayton Act to enforce section 7, it may authorize a transaction that will violate section 7 on the ground that the Commission believes it nontheless will be in the "public interest." (How it could be for a "lawful object" the court does not suggest.) If this holding is not plainly wrong—as we say it is—surely it is an important extension of the *Seaboard* principle that deserves plenary review by this Court.

4. *The section 5(4) question.* The foregoing analysis respecting the section 7 and impact on competition question is also applicable to the section 5 acquisition of control question. As the facts of record establish the probability of a section 7 violation, so also do they establish the probability of a violation of section 5(4), which makes it illegal for one carrier to acquire "the control or management in a common interest" of another without filing an application under section 5(2) for Commission approval after hearing. It is settled that the term "control" in section 5 embraces not only the establishment of a control relationship grounded in legal status such as the purchase of a majority stock interest, but also the establishment of any relationship, formal or informal, that "accomplish[es] a significant increase in the power of one [company] over the other, for example, an increased voice in management or operation, or the ability to accomplish financial transactions or operational changes with greater legal ease [.]" *Alleghany Corp.* v. *Breswick & Co.*, 353 U.S. 151, 169. This broad standard, which has been applied by the Commission in other cases,[25] is grounded

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[25] See, *e.g.*, *Chesapeake & O.R. Co. Purchase*, 271 I.C.C. 5 (1948) (6.2% interest); *Arkansas Motor Coaches—Control and Merger*, 56 M.C.C. 665, 674 (1954) (18% interest); *Greyhound Corp.-Control-Southeastern Greyhound Lines*, 57 M.C.C. 123 (1950) (10% interest); *Greyhound Corp. Investigation of Control-Southern Ltd.*, 45 M.C.C. 59, 77-82 (1946).

upon the statute itself. See section 5(4)[26] and section 1(3)(b).[27]

On this test, the Court found "control" in *Alleghany* despite the fact that Alleghany owned only 10% of the stock of the New York Central. And on the same test, the Court found control in *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, where there was no stock ownership at all.[28]

Since the Commission has the obligation to enforce section 5,[29] just as it does section 7 of the Clayton Act, it erred in approving the transaction as in the "public interest" and for a "lawful object" without considering the probable violation of section 5 revealed by the record.

5. *Fatal ambiguity of the order.* To this point, we have accepted *arguendo* the lower court's interpretation of the Commission's order, namely, that the Commission declined to pass on either the impact on competition question or the section 5 question, and that it stated as its reason the

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[26] "[C]ontrol or management in a common interest . . . however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. . . . [T]he words 'control or management' shall be construed to include the power to exercise control or management."

[27] "[S]uch reference [to 'control'] shall be construed to include action as well as legal control, whether maintained or exercised through or by reason of the method of or circumstances surrounding organization or operation, through or by common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or through or by any other direct or indirect means; and to include the power to exercise control."

[28] For other "control" situations involving no stock ownership, see *Hart* v. *Interstate Commerce Commission,* 226 F. Supp. 635 (D.Minn. 1964); *Buckeye Express, Inc.* v. *United States,* 14 Fed. Car. Cases ¶ 81,303 (S.D. Ohio 1960); *Lombard Bros., Inc.* v. *United States,* 226 F. Supp. 905 (D.Conn. 1964).

[29] In addition to section 5 itself, see section 12(1), 49 U.S.C. 12(1), which authorizes and "requires" the Commission to enforce the various provisions of Part I of the statute.

consideration that relevant circumstances might change as a result of Greyhound's 60-day offer. However, this interpretation of the order is insupportable. The order simply is not subject to any decently certain interpretation.

This Court has firmly established the requirement that "the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained." *Securities and Exchange Comm'n* v. *Chenery Corp.*, 318 U.S. 80, 94. See also *Automatic Canteen Company* v. *F.T.C.*, 346 U.S. 61, 81; *Phelps Dodge Corp.* v. *Labor Board*, 313 U.S. 177, 187; *Burlington Truck Lines* v. *United States*, 371 U.S. 156, 167-168; *United States* v. *Chicago, M., St.P. & P.R. Co.*, 294 U.S. 499, 510-511. This rule is not only a necessary incident of judicial review; it is specifically prescribed by statute. Section 8(b) of the Administrative Procedure Act, 5 U.S.C. 1007(b), which applies to the Commission, *Minneapolis & St.L.R. Co.* v. *United States*, 361 U.S. 173, 193-194, requires the Commission to include in its decisions "a statement of . . . findings and conclusion, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record. . . ."

On this standard, the order should not have been sustained. As to the section 7 question, the Commission stated simply that "an investigation of whether the proposed transaction, or further prospective agreements between applicant and Greyhound, might violate the provisions of section 5, or section 7 of the Clayton Act, would not be appropriate at this time. . . ." There is no explanation *why* the Commission so concluded—whether, as REA had argued, section 7 had no place in a section 20a proceeding, whether the record did not suggest a section 7 violation, whether the Justice Department should worry about section 7, *et al.* While clauses respecting the 20-day offer may be plucked out of other paragraphs of the order, those para-

graphs were plainly nothing but a general summary of all of the facts respecting the application and cannot reasonably be read as an explanation by the Commission for declining to meet the section 7 question.

As to the section 5 issue, the order is hardly any clearer. While, as has been noted, the Commission at one point said that a section 5 investigation would "not be appropriate at this time," the Commission also, in another passage, ruled that the transaction would not bring about an acquisition of control. This passage, which is set out in full in the margin, [30] can hardly be read otherwise. But if that be so, then (a) the order is internally inconsistent, (b) the lower court's construction of the order is incorrect and the question whether the Commission applied an incorrect test of "control" should have been decided, and (c) the Commission's position on section 7 becomes even more perplexing, since there could hardly be any reason for passing on the section 5 question but not the section 7 question.

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[30] "*It further appearing,* That intervenors' opposition is directed to the possibility of control of applicant by Greyhound, through the purchase of the proposed stock issue or presently outstanding shares or otherwise, and to the anticipated combination and correlation of certain of their facilities and services;

"*It further appearing,* That Greyhound offered to purchase a controlling stock interest, later offered to accept equal stock ownership with the railroads, and finally agreed to purchase the 20-percent stock interest as described; that it was told in negotiations by representatives of the railroads, including representatives of dissident railroads, that it would not acquire one additional share under the offer to purchase up to one million shares subject to the right of first refusal by such railroad shareholders; that the make-up of the board of directors under the by-laws, as amended, would not permit Greyhound to control the board; that 5 Greyhound directors would face 18 railroad directors, divided into three voting blocs, each having at least as many votes as Greyhound; that 13 railroad or at-large directors would have the power to prevent any action proposed by Greyhound; that it is unlikely that 5 Greyhound directors could sway the thinking of 8 such directors of the caliber normally holding such positions with applicant; and that control or power to control must be real and not based on conjecture or remote possibilities, *New York C. & St. L.R.Co. Control,* 295 I.C.C. 703 (714); . . ." App. B, *infra,* p. 44.

We submit that this order is an obvious violation of this Court's rule "that the Commission [should] not shelter behind uncritical generalities or such looseness of expression as to make it essentially impossible for [the courts] to determine what really lay behind the conclusions which [the courts] are to review." *Automatic Canteen Company* v. *F.T.C., supra,* at 81. The lower court's holding—itself stated only in conclusory terms—that "the Commission order is clear and understandable" (App., *infra* p. 40) is quite incorrect.

6. *The hearing question.* The lower court stated that the "main thrust of the plaintiffs' arguments is that the Commission should not have approved the stock issuance without a hearing," and disposed of that question, so far as one can tell, on the grounds that section 20a(6) leaves the question of a hearing to the discretion of the Commission and that plaintiffs' pleadings before the Commission did "not controvert any facts put of record by REA and [did] not allege any additional factual matters" (App., pp. 35, 36, *infra*). The court entirely misapprehended the "main thrust" of the attack on the order.

In fact, the hearing issue is collateral to the issues we have already discussed. If the Commission was correct in refusing to consider the impact on competition issue and the section 5 issue, then it was indisputably within the Commission's discretion under section 20a(6) to pass upon the fiscal aspects of the REA proposal without a hearing. On the other hand, if the Commission was obliged, as we maintain, to deal with those issues, then the only action that could have been taken without a hearing would have been denial of the application. Nothing turns upon whether or not the facts as stated by REA were "disputed," for those facts, as we have indicated, establish the probability of a section 7 and section 5(4) violation and the certainty of substantial

impact on competition. Hence, since REA opposed a hearing, and since it had the burden of proving, and the Commission the responsibility of finding, that the transaction was in the "public interest" and for a "lawful object," the application should have failed because the Commission, whether by hearing or not, certainly must assemble a record adequate to support whatever findings it makes. To put it differently, we say simply that, if the Commission should have considered the impact on competition and the section 5 issues, it should not have granted the application without a hearing, although it could have denied the application without a hearing. *Cf. White Motor Co.* v. *United States*, 372 U.S. 253, 264 (in section 7 cases "a trial rather than the use of the summary judgment is normally necessary"). But, as we have indicated, if the Commission should have considered those issues, the order must be set aside in any event.

Conclusion

For the reasons stated above, probable jurisdiction should be noted.

Respectfully submitted,

WILLIAM H. DEMPSEY, JR.
MARTIN J. FLYNN
734 Fifteenth Street, N.W.
Washington, D.C. 20005

GILES MORROW
1012—14th Street, N.W.
Washington, D.C. 20005

HARRY C. AMES
529 Transportation Bldg.
Washington, D.C. 20006
Counsel for appellant Freight Forwarders Institute

PETER T. BEARDSLEY
HARRY JORDAN
R. EDWIN BRADY
1616 P Street, N.W.
Washington, D.C. 20056
Counsel for appellant American Trucking Associations, Inc., and Regular Common Carrier Conference

JEREMIAH C. WATERMAN
205 Transportation Bldg.
Washington, D.C. 20006

ROYCE D. SICKLER
T. A. WHITE
1531 Stout Street
Denver, Colorado 80217

R. K. KNOWLTON
80 East Jackson Boulevard
Chicago, Illinois 60604

HARRY B. LATOURETTE
C. W. FIDDES
1517 West Front Street
Tyler, Texas 75702
Counsel for appellant Railroads

DAVID AXELROD
39 South La Salle Street
Chicago, Illinois 60603

EUGENE T. LIIPFERT
RONALD B. NATALIE
1035 Universal Bldg., North
Washington, D.C. 20009
Counsel for appellant Motor Carriers

WARREN A. GOFF
315 Continental Avenue
Dallas, Texas 75207
Counsel for appellant Motorbus Carriers